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PP

v.

SIM KENG TEE

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HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CRIMINAL TRIAL NO: MT(3) 45-4-2008]
25 AUGUST 2008

C ***CRIMINAL LAW**: Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Allegation of - Whether accused committed offence of trafficking in a dangerous drug - Prima facie case - Whether established - Dangerous Drugs Act 1952, s. 2*

D ***CRIMINAL PROCEDURE**: Prosecution - Prima facie case - Duty of prosecution to prove prima facie case - Criminal Procedure Code, s. 180(1) - Possession - Whether proved - Whether accused was shown to have physical custody of offending drugs - Whether accused sole exclusive user of car where drugs were found - Failure to call material witness - Evidence Act 1950, s. 114(g) - Whether circumstantial evidence* E *herein strong enough to point to the irresistible inference that accused person had exclusive control of drugs and car in question - Element of knowledge - Whether there was such evidence proffered by prosecution - Whether prima facie case successfully established - Dangerous Drugs Act* F *1952, s. 2*

***CRIMINAL PROCEDURE**: Prosecution - Prima facie case - Whether established - Whether prosecution presented evidence affirmatively linking accused with drugs - Whether there was reasonable inference of possession - Whether there was additional incriminating circumstances implicating* G *accused - Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)*

The accused was charged for trafficking in 1407.96 grams of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the H same Act. The accused claimed trial to the charge. At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence. The prosecution hence filed an appeal against the whole of the said decision. Briefly, the facts were that acting on information received I and on instruction of his superior, SP4 arrested the accused at a

restaurant in Bandar Baru Kangkar Pulai. A body search was conducted on the accused who then brought SP4 to his house in Pangsapuri Akasia, Taman Indah, Johor Bahru ('the said unit'). A search was made by SP4 in respect of the said unit and from the room occupied by the accused, SP4 found a set of car keys to a Proton Wira JFX 8122 ('the car in question'). From the boot of the said car, SP4 recovered two plastic containers (exh. P5 and P6) which contained liquids confirmed to contain methemphetamine, the subject matter of the charge. The issues that arose were (i) whether it was proved that the accused was in custody/control of the offending exhibits, especially physical custody;(ii) whether accused person was the sole exclusive user of the car in question; (iii) whether circumstantial evidence was strong enough and (iv) whether accused person had knowledge of presence of exh. P5 and exh. P6 in the boot of the car.

Held (acquitting and discharging the accused):

(1) To bring home a charge of trafficking in dangerous drugs, the prosecution must prove that the accused in this case came within the meaning of trafficking as defined in s. 2 of the Dangerous Drugs Act 1952. The prosecution must first and foremost prove that the accused was in possession of the drugs found in the boot of the car in question, for, unless he was in possession or in custody or control of it, he would not be in a position to traffic in such drugs. In this case, it was a mystery as to how the offending exhibits got into the boot of the car in question. There was no evidence that the accused had handled the drugs or that he had any knowledge of them. There was no evidence that the police had seen the accused putting any drugs in the boot of the car in question. The only link between the accused and the offending exhibits was the car registered under the accused's name and the car keys which were found from the room occupied by the accused. The accused had been arrested as a result of a tip off. The police was not informed of the name of the suspect or even the registration number of the vehicle involved. No evidence was adduced to indicate whether those impugned dangerous drugs would be in liquid form or would be hidden in any part of the vehicle and whether any other third party would have access to them. There was no evidence from which could

A reasonably be inferred that the accused had custody and/or control of exh. P5 and exh. P6. The evidence against the accused was essentially of juxtaposition, amounting to nothing more than grave suspicion. (paras 11, 12 & 14)

B **(2)** There was no evidence that the accused person was the sole exclusive user of the car in question. To sustain a conviction either for the offence of possession or trafficking under the Act, exclusivity of area or place where the drug was found must be proved by the prosecution. It was therefore C incumbent on the prosecution to discharge this burden. The car keys were found in the unlocked bedroom of the accused person. The accused had three 'anak angkat' living with him. There was no impediment for the 'anak-anak angkat' to conceal or to put both exh.P5 and exh.P6 in the boot of the D car in question and put the keys back in the absence of the accused. It could not be denied that the 'anak-anak' angkat had access to the car. Further, the unchallenged evidence adduced by the prosecution revealed that one Lee Gin Fong had been arrested and charged with the accused person, E subsequently released and currently being detained for trafficking in methamphetamine in liquid form like in exhs. P5 and P6. In addition, the accused person had told SP4 that Lee Gin Fong had borrowed the car in question the day before. Lee Gin Fong was an important and material witness F to the case. His testimony would have made significant difference to the prosecution case. He ought to have been called by the prosecution or offered for cross examination. By such failure, not only was there a gap in the narrative of the prosecution case but also the presumption under s. 114(g) of G the Evidence Act 1950 would be attracted. (para 15)

(3) A conviction for possession of dangerous drugs may be predicated on circumstantial evidence and the drugs need not be found in actual physical possession of the accused, as long as it is found in a place or area under his control or custody. H However, where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstantial shown must exclude every other reasonable hypothesis other than that of guilt; and proof amounting only to strong suspicion of a mere possibility was insufficient to I sustain a conviction. The strength of the circumstantial

evidence in this case was not strong enough to point to the irresistible inference that the accused person had custody/control of exh. P5 and exh. P6. The prosecution had failed to prove that the accused had exclusive possession of exh. P5 and exh. P6 found in the boot of the car in question given the fact that others, too, had access to the car in question. (para 15)

(4) Possession encompasses the element of physical as well as an element of knowledge and without knowledge there can never be possession under the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. There was no factual matrix on which the court could make inference that the accused had knowledge of presence of exh. P5 and P6 in the boot of the car in question. The mere presence of exh. P5 and exh. P6 in the boot of the car in question which was registered under the accused's name, without more, would be insufficient to infer that the accused had the requisite knowledge. The accused's knowledge of presence of exh. P5 and exh. P6 may be inferred if there were additional circumstances tending to buttress such an inference. These additional circumstances include incriminating statements by the accused; attempted flight or furtive gesture; personal items owned by the accused mingled with offending exhibits; finger prints etc. There was no such evidence proffered by the prosecution. In fact, the accused's conduct was very consistent with his innocence. The court could not indulge in conjecture and speculation in drawing an inescapable inference from the set of facts in this case that the accused had knowledge of exh. P5 and exh. P6 in the boot of the car in question. (para 15)

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Dato' Mokhtar Hashim v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***

Ho Seng Seng v. Rex [1951] 1 LNS 25 ***(refd)***

Idris v. PP [1960] 1 LNS 40 ***(refd)***

Leow Nghee Lim v. Regina [1955] 1 LNS 53 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 ***(refd)***
Neo Koon Cheo v. Regina [1959] 1 LNS 64 ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Haniff Basree Abdul Rahman [2007] 2 CLJ 33 CA ***(refd)***
PP v. Letchumanan Krishnan [2007] 1 LNS 490 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Sim Ah Ba & Anor [1995] 1 LNS 330 ***(refd)***
PP v. Tukiman Demin [2008] 8 CLJ 856 HC ***(refd)***
Rosenizam Maharam v. PP [2002] 1 LNS 260 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Toh Ah Loh and Mak Thim v. Rex [1948] 1 LNS 72 ***(refd)***
Tong Peng Hong v. PP [1955] 1 LNS 165 ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), 39B(2)
Dangerous Drugs Ordinance, ss. 6, 9, 10(2), 37(d)
Evidence Act 1950, s. 114(g)

For the accused - Tuan Hj Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the PP - Husmin Hussin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JC:

Background

[1] Sim Keng Tee ('the accused'), was charged for trafficking in 1407.96 grams of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same Act.

[2] The accused claimed trial to the charge.

[3] The prosecution called five witnesses to support its case. They are Encik Muhammad Yazid bin Ibrahim (SP1); L/Kpl. James a/k Ragai (SP2); Sjn. Anwar bin Md Dini (SP3); ASP Zainozin bin Ishak (SP4) and Insp Shafizan bin Mohd Sharif (SP5).

[4] At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence.

[5] The prosecution now files an appeal against the whole of the said decision.

The Charge

[6] The charge in Bahasa Malaysia was in the following terms:

> Bahawa kamu pada 07.04.2007, jam lebih kurang 10.50 malam, di tempat parking kereta Lot A 723, Blok A, Jln Persiaran Titiwangsa Utara, Pangsapuri Sri Akasia, Taman Tampoi Indah, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 1407.96 gram Methamphetamine dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The Prosecution Case

[7] The brief facts relevant to this judgment are these:

7.1 Acting on information received and on instruction of his superior, SP4 arrested the accused and two other persons on 7 April 2007 at the Restaurant TLC at No. 36, Jalan Padi Harmoni 1, Bandar Baru Kangkar Pulai. They were playing mahjong. The two other persons were released immediately thereafter.

7.2 A body search was conducted on the accused. Amongst the items recovered from him was a solex key (exh. P14). He was brought to his house which is at Block A, Tingkat 8 – 15, Pangsapuri Akasia, Taman Indah, Johor Bahru ("the said unit").

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7.3 A search was made by SP4 in respect of the said unit. From the room occupied by the accused, SP4 found a set of car keys (exh. P15A and exh. P15B).

7.4 Using the set of car keys seized from the said room, a
B search was then made in respect of the car, Proton Wira JFX 8122 ("the car in question") which was parked at Lot A 723, Block A of the said pangsapuri. From the boot of the car, SP4 recovered 2 plastic containers (exh. P5 and exh. P6) which contained liquids. These liquids were
C analysed by the chemist (SP1) and confirmed to contain 1407.96 grams of methamphetamine, the subject matter of the charge. Since learned counsel for the accused in his submission had not raised any issue on the identity of the offending exhibits and the testimony of the chemist, I think
D it is not necessary for me to advert to that part of evidence. I accepted his findings with regard to the identification and method of analysis of that drugs. I was satisfied that the analysis was properly conducted by SP1 and cannot be faulted.

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7.5 In cross-examination, SP4 made the following concessions:

(a) that the condominium unit had three rooms and in all the rooms there were signs of occupation, meaning evidence of the rooms being occupied;

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(b) that "seorang anak angkat" of the accused person stayed with him at the unit; and

(c) that the accused person informed him (SP4) that on 6.4.2007, one day before his arrest, one Lee Gin Fong
G had borrowed the car in question.

7.6 Apart from the formal aspects of his evidence, SP6 (Investigating Officer), in his cross-examination, made the following concessions:

H

(a) that he cannot deny that the accused had three "anak angkat" and they were Ho Phooi Chee, Ho Yong Sen and Wong Chin Cheng and further cannot deny that they had access to the car in question;

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(b) that Lee Gin Fong was arrested and charged together with the accused and subsequently released on instructions from the office of the Public Prosecutor in Putrajaya; and

(c) that Lee Gin Fong is currently being held under the Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('LLPK') at the Pusat Pemulihan Akhlak Muar for drug trafficking activities in methamphetamine in liquid form like in exh. P5 and exh. P6.

[8] Concerning the concessions made by both SP4 and SP6, it is to be noted that these concessions could amount to evidence as the witnesses here agreed to the suggestions made by the defence counsel during cross-examination. In *PP v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215, Augustine Paul J said at p. 341:

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence, **if it is clearly repudiated by the witness to whom it is made.** (emphasis added).

[9] Perhaps it is not out of place in this context to refer to the judgment of Taylor J in *Leow Nghee Lim v. Reg* [1955] 1 LNS 53. Taylor J said:

> ... [A]n accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted.

Burden On The Prosecution

[10] It is the duty of the prosecution at the close of its case to prove a *prima facie* case against the accused as provided under s. 180(1) of the Criminal Procedure Code. The steps that should be taken by the trial court at the close of the prosecution's case had been set out in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Balachandran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *PP v. Datuk Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215.

Finding Of The Court

[11] On the maximum evaluation of the evidence presented by the prosecution, this court found that the prosecution had failed to prove a *prima facie* case against the accused for the following reasons:

(a) No custody and/or control

To bring home a charge of trafficking in dangerous drugs, the prosecution must prove that what the accused did in this case come within the meaning of trafficking as defined in s. 2 of the Dangerous Drugs Act 1952 which defines trafficking as follows:

> Unless the context otherwise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug.

The offending drugs in the present case were recovered from the boot of the car in question which was registered under the accused's name. Given that fact, can he be accused of doing any of the acts envisaged in the context of s. 2 above? As a matter of common sense, it follows that to prove trafficking under that section, it would be necessary for the prosecution first and foremost to prove that the accused was in possession of the drugs or that he was in custody and control of the drugs found in the boot of the car in question, for, unless he was in possession or in custody or control of it, he would not be in a position to traffic in such drugs (*Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649).

In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 Taylor J said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are, and have the

means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them not amounting to possession.

As regards the word 'control', it was said in *Rosenizam bin Maharam v. PP* [2003] 5 MLJ 49 as follows:

> The word 'control' has not been statutorily defined in the Act and so guidance may be derived from its ordinary popular dictionary meaning as follows:
>
> (1) the power of directing, command, restraint (*The Concise Oxford Dictionary* (9th Edn, 1995)); and
>
> (2) exercising restraint or directing influence *(Black's Law Dictionary)*.
>
> Illustrations of the meaning of 'control' are also to be found in judicial pronouncements of our courts.

In *Ho Seng Seng v. Rex* [1951] 1 LNS 25, the appellant was found carrying a basket containing one large paper parcel and one small. The large parcel, which was on top, contained 12 pieces of opium. The appellant was convicted by the district judge under s. 6 of the then Dangerous Drugs Ordinance. When he was arrested, the appellant said that the basket had been handed over to him by another person named Ah Tan, who had asked him to go to a coffee shop and wait for him there, and that he knew nothing of the contents of the basket.

On appeal, Brown Ag CJ sitting as a High Court Judge held that the district judge had misdirected himself upon the burden of proof and allowed the appeal, holding that the element of knowledge is implicit in the word 'control' and that one cannot have control of a thing unless one knows it is there ie, the onus was upon the prosecution to prove to the satisfaction of the court that the appellant knew that a dangerous drug was in the basket, which in turn would raise the presumption under s. 37(d) that the appellant was in possession of it and knew that it was opium.

The learned Acting Chief Justice explained that the term 'control' has a more restricted meaning than 'possession' and referred to the characteristics of 'possession' laid down by the Court of Criminal Appeal in *Toh Ah Loh and Mak Thim v. Rex* [1948] 1 LNS 72 as follows:

(a) the possessor must know the nature of the thing possessed;

(b) he must have a power of disposal over it; and

(c) he must be conscious of his possession of the thing.

The learned Acting Chief Justice opined that for the term 'control', it is sufficient for the prosecution to prove characteristics (b) and (c), in which case the prosecution is deemed to have proved characteristic (a) for the purposes of 'possession'.

Ambrose J in *Neo Koon Cheo v. Regina* [1959] 1 LNS 64 disagreed with the view expressed by the learned Acting Chief Justice in *Ho Seng Seng, supra,* and explained that the word 'control' must be construed to mean any form of control other than actual physical control, and that actual physical condition would be 'custody' for which other names are 'physical possession', '*de facto* possession' and 'detention'.

In *Neo Koon Cheo,* a party of three detectives made a raid on the attic of a premises, and on entering the attic, two of the detectives saw the appellant holding a confectionary tin in his hands and attempting to get out of the attic through an opening. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. The appellant was charged with and convicted of possession of prepared opium and smoking utensils in contravention of ss. 9 and 10(2) respectively of the Dangerous Drugs Ordinance. In dismissing the appeal, Ambrose J held that the contents of the confectionary tin were in the appellants's control.

Neo Koon Cheo, supra, was followed by Jeffrey Tan JC (now J) in *Public Prosecutor v. Sim Ah Ba & Anor* [1995] 1 LNS 330 pertaining to the construction of the word 'control' as any form of control other than physical control.

[12] On the evidence adduced by the prosecution, it has not been proved that the accused was in custody and/or control of the offending exhibits, especially physical custody. It is still a mystery as to how the offending exhibits got into the boot of the car in question and there is no evidence that the accused had handled the drugs or, he had any knowledge of them. There is no evidence that the police had seen the accused putting any drugs in the boot of the car in question. The only link between the accused and the offending exhibits is the car which was registered under the accused's name (see exh. P24) and the car keys (exh. P15A and exh. P15B) which were found from the room occupied by the accused.

[13] It was clear from the evidence of SP4 that the accused was arrested as a result of a tip-off received by his superior, ASP Howe Sye Eng. Whether the tipster was a paid informer or otherwise was not revealed because ASP Howe Sye Eng was not called to testify. The police was not informed of the name of the suspect or even the registration number of the vehicle involved. No evidence adduced n court to indicate whether those impugned dangerous drugs would be in liquid form like exh. P5 and exh. P6 or would be hidden in any part of the vehicle and whether any other third party would have access to them. These questions were relevant because one Lee Gin Fong was also arrested and charged with the accused person for trafficking in methamphetaminen in liquid form like in exh. P5 and exh. P6, the subject matter of the charge. In another tip-off case, Edgar Joseph Jr J in *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 at p 4 had occasion to opine:

> With respect, given the fact that this was a case where the police were acting on a tip-off, undoubtedly by an informer, who might have been a paid informer … the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

[14] There was no evidence from which it could reasonably inferred that the accused had custody and/or control of exh. P5 and exh. P6 found in the boot of the car in question. The evidence against the accused was essentially of juxtaposition, amounting to nothing more that grave suspicion.

[15] On the question of "presumptive possession of drugs" as provided for in s. 37(d) of the Act, I respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] 1 LNS 165 that a vehicle in which a drug is carried does not *ipso facto* fall within the words of "anything whatsoever containing any dangerous drugs" and therefore, the presumption under s. 37(d) does not arise in this case. This proposition of law was approved by the supreme Court in the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285.

(b) No exclusive user of the car in question

There is no evidence that the accused person is the sole exclusive user of the car in question. It is settled law that to sustain a conviction either for the offence of possession or trafficking under the Act, exclusivity of area or place where the drug was found, must be proved by the prosecution. It is therefore incumbent on the prosecution to discharge this burden. If there are gaps, the prosecution must close the gaps. There is also no duty on the defence to prove possibility of access by others to the dangerous drugs but on the prosecution to exclude such possibility (see: *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 and *PP v. Tukiman Demin* [2008] 8 CLJ 856.)

On the evidence adduced, the car keys were found in the unlocked bedroom of the accused person. There is no impediment for the "anak-anak angkat" to conceal or to put both exh. P5 and exh. P6 in the boot of the car in question and put the keys back in the absence of the accused. There ought to be investigation on this aspect. The I.O (SP6) ought to have taken greater efforts to investigate this. He could have gone to the unit next day, or the night in question to look for "anak-anak angkat". Regrettably, this was not done. That being the case, the I.O. cannot deny that "anak-anak angkat" had access to the car.

Further, the unchallenged evidence adduced by the prosecution reveals that Lee Gin Fong is a real person. He was arrested and charged with the accused person. He was subsequently released and currently being detained under 'LLPK' for trafficking in methamphetamine in liquid from like in exh. P5 and exh. P6. In addition, the accused person had told SP4 that Lee Gin Fong had borrowed the car in question the day before, that is, on 6 April 2007. Why was Lee Gin Fong not produced or his 112 statement tendered? Surely, Lee Gin Fong can be located, why is he not produced? His 112 statement was recorded from him but why it was not produced? Lee Gin Fong could have clear away doubts especially he is now being detained for drug trafficking activities. Obviously, he was a suspect and he is not just any witness but an important and material witness to the case. His testimony would made a significant difference to the prosecution case. That being the case, he ought to have been called by the prosecution or offered for cross-examination or at least made available to the defence at the close of the prosecution or in default, or otherwise been given an explanation why the prosecution was unable or unwilling to call him. Further, there was no suggestion that his testimony would have been hostile or unreliable. Therefore, by such failure, not only there was a gap in the narrative of the prosecution case but also the presumption under s. 114(g) of the Act would be attracted (see: *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 and *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1).

(c) Circumstantial evidence is not strong enough

It is settled law that a conviction for possession of dangerous drugs may be predicated on circumstantial evidence and the drugs need not be found in actual physical possession of the accused, as long as it is found in a place or area under his control or custody. However, where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstantial shown, must, as in all other criminal cases, exclude every other reasonable hyphothesis other than that of guilt; and proof amounting only to strong suspicion or a merely possibility is insufficient to sustain a conviction (see: *Idris v. PP* [1960] 1 LNS 40, *Dato'*

Mokhtar bin Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 and *PP v. Letchumanan a/l Krishnan* [2007] 1 LNS 490). The court of Appeal in *PP v. Haniff Basree Abdul Rahman* [2007] 2 CLJ 33 said at p. 68:

> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see: *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307). … Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see: *Idris v Public Prosecutor* [1960] MLJ 96).

The strength of the circumstantial evidence in this case is not strong enough to point to the irresistible inference that the accused person had custody/control of exh. P5 and exh. P6. The following inference can be made:

(i) that Lee Gin Fong put exh. P5 and exh. P6 in the boot of the car in question;

(ii) that the "anak angkat" put exh. P5 and exh. P6 in the boot of the car in question;

(iii) that the accused put exh. P5 and exh. P6 in the boot of the car in question; or

(iv) that anyone of the above put exh. P5 and exh. P6 in the boot of the car in question.

The prosecution had failed to prove that the accused had exclusive possession of exh. P5 and exh. P6 found in the boot of the car in question given the fact that others, too, had access to the car in question.

(d) Knowledge of presence of exh. P5 and exh. P6 in the boot of the car

It is settled law that possession encompasses the element of physical as well as an element of knowledge and without knowledge there can never be possession under the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. In *Ong Ah Chuan v. PP* [1980] 1 LNS 181, Lord Diplock said:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did.

A case where knowledge is proven by direct and by inference or circumstantial evidence is *Wong Nam Loi v. PP* [1998] 1 CLJ 37. The appellant was driving a motor van from Butterworth to Nibong Tebal when he was stopped by the police at a road block. The police found a refrigerator lying on its side behind the driver's seat. On examination of the refrigerator, the police found 80 blocks of white substance inside, confirmed by chemist to be heroin weighing 20,269.5 grams. The accused said that he was innocent carrier of the refrigerator which belonged to a friend known as "Lim" and had no knowledge of its content. The Court of Appeal held that the appellant had knowledge of the drugs by inference from the following circumstances: (1) the appellant did not protest nor display any conduct consistent with his lack of knowledge of the drugs when the drugs were found; (2) after the appellant was arrested and handcuffed, he pointed out to the refrigerator; and (3) on the way to police station, the appellant admitted to conveying a few katis of the drugs and tried to bribe the police officers. The court held that there was ample evidence both direct and by necessary inferences to show that the appellant knew that the refrigerator contained heroin.

In the instant case, there is no factual matrix on which the court can make inference that the accused had knowledge of presence of exh. P5 and exh. P6 in the boot of the car in question. The mere presence of exh. P5 and exh. P6 in the boot of the car in question which is registered under the

A accused's name, without more, would be insufficient to infer that the accused had the requisite knowledge. The accused knowledge of presence of exh. P5 and exh. P6 may be inferred if there are additional circumstances tending to buttress such an inference. These additional circumstances include: (1)
B incriminating statements by the accused; (2) attempted flight or furtive gesture; (3) personal items owned by the accused mingle with offending exhibits; (4) finger prints; etc. In this case, there is no such evidence proffered by the prosecution. In fact, the accused conduct is very consistent with his
C innocence. The court cannot indulge in conjecture and speculation in drawing an inescapable inference from the set of facts in this case that the accused had knowledge of exh. P5 and exh. P6 in the boot of the car in question.

D **Conclusion**

[16] I had subjected the prosecution evidence to maximum evaluation and asked myself this question: "If I decide to call upon the accused to enter his defence and he elects to remain silent,
E am I prepared to convict him on the totality of the evidence contained in the prosecution case?". For the reasons already given, my answer is in the negative and in the result, the accused was acquitted and discharged without calling upon him to enter his defence.

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